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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 674.

WORLD COMMERCE CORPORATION, S.A.,

Petitioner,

v.

MINERALS AND CHEMICALS PHILIPP CORP.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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INDEX

	PAGE
CITATIONS TO OPINION BELOW	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
The Arbitration	3
Judicial Review of the Subpoena	5
ARGUMENT:	
The Order Below is Not Final	6
No Federal Question is Presented	9
A. The Enforcement of the Order Will Not Constitute a "Search and Seizure"	9
B. World Commerce Has Not Been Denied Due Process	11
CONCLUSION	13

TABLE OF AUTHORITIES AND REFERENCES

CASES

	PAGE
Alexander v. *United States*, 201 U. S. 117 (1906)	8
Attorney General, Matter of, 155 N. Y. 441 (1898)	7
Beebe v. *Russell*, 19 How. 283 (1856)	8, 9
Cobbledick v. *United States*, 309 U. S. 324 (1940)	7
Drake v. *Herrman*, 261 N. Y. 414 (1933)	12
Ebbets, Matter of, 155 Misc. 860 (Surr. Ct., Kings Co. 1935)	12
Gospel Army v. *Los Angeles*, 331 U. S. 543 (1947)	7
Grays Harbor Logging Co. v. *Coats-Fordney Co.*, 243 U. S. 251 (1917)	8
Hale v. *Henkel*, 201 U. S. 43 (1906)	10
Konisberg v. *State Bar of California*, 366 U. S. 36 (1961)	7
Lacky v. *Winston*, 186 App. Div. 642 (3rd Dept., 1919)	12
Makgmes, Matter of, 238 App. Div. 534 (4th Dept., 1933)	13
Market Street Ry. Co. v. *Railroad Commission*, 324 U. S. 548 (1948)	7
Morris & Cummings Dredging Co., Matter of, 209 N. Y. 588 (1913)	6, 7
Oklahoma Press Pub. Co. v. *Walling*, 327 U. S. 186 (1946)	9, 10
Republic Natural Gas Co. v. *Oklahoma*, 334 U. S. 62 (1948)	8

CONSTITUTION AND STATUTES

United States Constitution, Amend. IV	2, 9
United States Constitution, Amend. XIV	2, 11
28 U. S. C. §1257 (3)	6

TREATISE

Cohen & Karger, Powers of the New York Court of Appeals, (rev. ed. 1952)	7

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MINERALS AND CHEMICALS PHILIPP CORP.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

CITATIONS TO OPINIONS BELOW

The order of Special Term, New York County, Supreme Court of the State of New York (hereinafter "Special Term"), entered October 30, 1961, denying World Commerce's motion to quash a subpoena *duces tecum* issued by the arbitrators is not reported. It is printed in the record (13-50).[1]

The order of the Supreme Court of the State of New York, Appellate Division, First Department (hereinafter "Appellate Division"), entered on February 27, 1962, modifying and affirming the order of Special Term, is not reported. It is printed in the record (442-444).

The opinion of the Appellate Division, First Department, on the order entered on February 27, 1962 upon

[1] References are to folios in the printed "Papers on Appeal From Order" in the Court of Appeals of the State of New York, filed in this Court by Petitioner.

which review is sought, is reported at 15 A. D. 2d 432, 224 N. Y. Supp. 2d 763 and is printed in the record (445-456).

The order of July 6, 1962 of the Court of Appeals of the State of New York (hereinafter "Court of Appeals"), dismissing World Commerce's appeal to that Court is reported at 11 N. Y. 2d 1109, 184 N. E. 2d 319 and is printed in the Petition, Appendix A, pp. A7-A8.

The Appellate Division's order of September 20, 1962 denying World Commerce's motion for leave to appeal to the Court of Appeals is reported at 15 A. D. 2d 885, and is printed in the Petition, Appendix A. pp. A11-A12.

The Court of Appeals' order of September 27, 1962 denying World Commerce's motion to resettle the order of the Court of Appeals of July 6, 1962 is reported at 12 N. Y. 2d 672, and is printed in the Petition, Appendix A, pp. A9-A10.

QUESTIONS PRESENTED

1. Whether a State Court order affirming an order denying a motion to quash a subpoena *duces tecum*, and remanding the cause to the lower court for further judicial proceedings is a final order within the jurisdiction of this Court.

2. Whether World Commerce has raised a substantial Federal question under the Fourth and Fourteenth Amendments to the United States Constitution where

(a) It concedes that the documents called for by a subpoena *duces tecum* are limited and particularly described.

(b) The relevance of the documents subpoenaed was fully demonstrated before the arbitrators prior to its issuance and before the New York courts in proceedings brought to quash the subpoena, and

(c) World Commerce has been afforded the right to a judicial determination with respect to the confidential nature of the documents but has declined to exercise this right.

STATEMENT OF THE CASE

Petitioner, World Commerce Corporation, S. A., a Panamanian corporation, seeks review of an order of the Appellate Division, entered on February 27, 1962 (442-444), affirming and modifying Special Term's denial of its motion to quash a subpoena *duces tecum* issued by the arbitrators in an arbitration proceeding between respondent, Minerals & Chemicals Philipp Corporation and Panamerican Commodities, S. A. (the parties hereinafter are referred to as "World Commerce", "Philipp" and "Panamerican", respectively.)

The Arbitration

The arbitration proceeding was instituted on November 20, 1959 by Philipp to recover substantial damages from Panamerican for breach of a contract wherein Philipp was appointed exclusive agent for the sale of Acari ore mined by Panamerican in Peru (3, 83, 84). Under the provisions of the agency contract six months notice of termination was required (135).

Prior to the execution of the agency contract on January 9, 1959 and until June 11, 1959, Philipp conducted extensive negotiations with the major iron ore consumers in the United States in an effort to generate interest in and create a market for Acari ore (248, 249). As a result of its negotiations Philipp made an initial sale to Armco Steel Corporation and made firm offers to other major steel

producers (249). Philipp advised Panamerican of these offers on June 5, 1959. On June 11, 1959, Panamerican terminated the agency contract, without notice, by instructing Philipp to make no further offers and withdraw those previously made (249, 250). Panamerican thereafter disposed of its entire output to Ore Marketing Corporation (Ore Marketing) pursuant to a contract negotiated prior to June 11, 1959 and executed shortly thereafter (251, 252). Ore Marketing, in turn, disposed of the ore to World Commerce, its affiliate, which then sold the ore to consumers in the United States with whom Philipp had been actively negotiating (107, 108, 131-147, 251-254).

On December 30, 1960, in contemplation of presenting its proof before the arbitrators, Philipp requested World Commerce to make available to it certain information regarding sales of Acari ore (64-69). World Commerce refused to make such information available (74, 75).

On February 27, 1961, having failed to obtain the information requested of World Commerce voluntarily, Philipp moved at Special Term for an order to examine World Commerce before trial. Philipp's motion was denied on the ground that process in an arbitration proceeding should issue from the arbitrators "absent extraordinary circumstances" (421-426). Special Term's decision was affirmed without opinion by the Appellate Division, First Department on May 24, 1961 (29).

At the initial arbitration hearing on September 29, 1961, Philipp requested the arbitrators to issue a subpoena *duces tecum* to World Commerce requiring it to produce certain documents bearing upon the quantity of Acari ore sold by it, the purchasers of such ore and the terms of sale (153-156). At the outset the arbitrators required that Philipp demonstrate the relevancy of the documents to be subpoenaed (121). Thereupon counsel demonstrated that

Philipp intended to use the information sought in proving that there was a ready market for Acari ore; that such ore was sold to customers whom Philipp initially solicited; and the damages sustained by Philipp as a result of the breach of the agency agreement (155, 156). After extensive argument by counsel for Philipp and counsel for Panamerican with respect to the relevancy of the documents sought, the arbitrators unanimously ruled that the instant subpoena would be issued to World Commerce (216).

Judicial Review of the Subpoena

When served with the subpoena *duces tecum*, World Commerce moved to quash it before Special Term on the ground that the documents sought were confidential and not relevant to the issues before the arbitrators (36-39). After reviewing the record of the arbitration proceeding, Special Term denied World Commerce's motion by order of October 30, 1961, stating:

> "The minutes of the hearing before the arbitrators disclose that the production of the books and records are material and necessary. Whether the material is confidential is a matter for determination by the arbitrators, who will make their decision after examining the records" (15).

World Commerce appealed Special Term's order to the Appellate Division (7-12). The Appellate Division held the documents subpoenaed were clearly relevant both on the issue of the breach of the agency contract and on damages (453). However, it modified the order appealed from and remanded the proceeding to Special Term to "consider an application by appellant (World Commerce), if it is so advised, for the designation of a referee to super-

vise the production and inspection of documents described in the subpoena to the end that confidential data be not unnecessarily disclosed,'' ... (444). As so modified, Special Term's order was affirmed (444).

On April 27, 1962 World Commerce served notice that it would appeal to the Court of Appeals from the Appellate Division's order (7-12). Upon motion by Philipp, the Court of Appeals, by order of July 6, 1962, dismissed World Commerce's appeal upon the ground that the order sought to be appealed from was not final within the meaning of the Constitution of the State of New York. (Petition, Appendix A, pp. A7, A8.) Subsequently, the Court of Appeals denied World Commerce's motion to resettle the order dismissing its appeal

> ''Upon the ground that the order appealed from is not a final order in a separate proceeding, but an order made in the course of the arbitration proceeding (See, Civ. Prac. Act, §1459; *Matter of Morris & Cummings Dredging Company*, 209 N. Y. 588.)'' (Petition Appendix A, pp. A9, A10)

Thereafter, on September 20, 1962, World Commerce's motion for leave to appeal to the Court of Appeals was denied by the Appellate Division. (Petition, Appendix A, pp. A11, A12.)

ARGUMENT

The Order Below is not Final

Title 28 U.S.C. §1257 provides that this Court may review only ''final judgments or decrees'' of a state court. An order upon which review is sought: (1) must be final as an effective determination of the litigation and not of

merely interlocutory or intermediate steps therein; and (2) it must be subject to no further review or correction in any other state tribunal. *Market Street Ry. Co.* v. *Railroad Commission*, 324 U. S. 548, 551 (1948). The order sought to be reviewed herein is not final in either respect.

The Appellate Division's order requires World Commerce, a witness to the arbitration proceeding, to produce certain documents pursuant to a subpoena *duces tecum*. Under the law of New York such an order is deemed auxiliary and administrative to an action or proceeding since it is designed to facilitate the disposition of the "merits although it does not adjudicate any issue on the merits either as to the parties or as to strangers." *Matter of Morris & Cummings Dredging Co.*, 209 N. Y. 588 (1913); *Matter of Attorney General*, 155 N. Y. 441 (1898); See *Cohen & Karger, Powers of the New York Court of Appeals*, rev. ed. at pp. 203, 206. Although the decision of the Court of Appeals designating the Appellate Division's order as non-final is not controlling, this Court regards it as both pertinent and persuasive. *Konisberg* v. *State Bar of California*, 366 U. S. 36 (1961); *Gospel Army* v. *Los Angeles*, 331 U. S. 543 (1947). Moreover, the decisions of the New York courts on this aspect of finality are in full accord with those of this Court.

Cobbledick v. *United States*, 309 U. S. 324 (1940) is decisive. There this Court held non-final an order denying a motion to quash subpoenas *duces tecum* directed to witnesses. Mr. Justice Frankfurter stated:

> "... The requirement of finality will be enforced not only against a party to the litigation but against the witness who is a stranger to the main proceeding. Neither a party nor a non-party witness will be allowed to take to the upper court a ruling where the result of review will be 'to halt in the orderly

progress of a cause and consider incidentally a question which has happened to cross the path of such litigation.' Segurola *v.* United States, 275 U. S. 106, 112, 72 L ed. 186, 189, 48 S Ct. 77. This is so despite the fact that a witness who as a stranger to the litigation could not be party to an appeal taken at the conclusion of the main cause" (p. 326).

Similarly, in *Alexander* v. *United States*, 201 U. S. 117 (1906), this Court dismissed an appeal from an order requiring witnesses to appear and produce documents before an examiner. Mr. Justice McKenna stated the basis for the Court's ruling:

> "In a certain sense finality can be asserted of the orders under review; so, in a certain sense, finality can be asserted of any order of a court. And such order may coerce a witness, leaving to him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is appeal. Let the Court go farther and punish the witness for contempt of its order,—then arrives a right of review; and this is adequate for his protection without unduly impeding the progress of the case . . . Prior to that the proceedings are interlocutory in the original suit" (pp. 121, 122).

A further aspect of the non-finality of the Appellate Division's order is derived from the right given World Commerce to apply for the appointment of a referee to supervise the production of its documents. This Court has established as a fundamental precept of finality that an order or judgment contemplating further discretionary action on remand is not final. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62 (1948); *Grays Harbor Logging Co.* v. *Coats-Fordney Co.*, 243 U. S. 251 (1917); *Beebe* v.

Russell, 19 How. 283 (1857). Here, the remand affords World Commerce the right to receive a judicial determination as to the confidential nature of the documents subpoenaed. Clearly such review is not ministerial but discretionary in nature for it provides to World Commerce the protection it claims to be seeking herein.

The principle of finality as a condition of review is salutary. It forbids piecemeal disposition by appeal of what for practical purposes is a single controversy. It prevents the obstruction of just claims that would arise from permitting the harassment and costs of a succession of separate appeals from the rulings that arise in various stages of a proceeding. This principle is particularly applicable in arbitration where the parties seek and are entitled to an economical and expeditious settlement of a controversy.

No Federal Question is Presented

A. Enforcement of the Order Will Not Constitute a "Search and Seizure"

World Commerce attempts to raise a substantial Federal question by contending that the enforcement of the subpoena as directed by the New York courts violates its rights secured by the Fourth Amendment. This contention is patently without merit. In *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186 (1946), this Court clearly defined the constitutional limitations inherent in the issuance and enforcement of a subpoena *duces tecum*. In affirming certain orders requiring compliance with subpoenas *duces tecum*, Mr. Justice Rutledge disposed of the Fourth Amendment argument by stating:

> "The short answer to the Fourth Amendment objections is that the records in these cases present

> no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside. No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections, which in fact were made. Nor has any objection been taken to the breadth of the subpoenaes or to any other specific defect which would invalidate them" (p. 195).

Here, as in *Oklahoma Press Pub. Co.*, World Commerce is compelled to produce its documents pursuant to valid court order only after it was afforded the opportunity to object which, in fact, it did. Moreover, no objection has been made with respect to the breadth of the subpoena and, in fact, World Commerce concedes that the documents sought are limited and particularly described. World Commerce seeks to raise a substantial Federal question under the Fourth Amendment upon the sole basis that the subpoena was issued and enforced "without any evidence of relevance." (Petition, p. 15.) In this regard World Commerce's reliance upon *Hale* v. *Henkel*, 201 U. S. 43 (1906), to support its argument is misplaced.

In *Hale*, this Court in passing upon the validity of a subpoena *duces tecum* issued to a witness and enforced by the courts stated:

> "Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with other companies implicated, or some

evidence of their materiality produced, to justify an order for the production of such a mass of papers" (p. 77).

Here, it is manifest that "some evidence of the materiality" of the documents subpoenaed was produced. As stated above, prior to the issuance of the subpoena at the initial arbitration proceeding, the arbitrators required and received a particularized statement as to the relevancy of the documents sought (121). In opposition to the motion to quash the subpoena, detailed affidavits were submitted to the Court on the issue of relevancy (79, 103). As stated in the opinion of the Appellate Division affirming the denial of the motion to quash the subpoena, "Minerals Corp., (Philipp) at the hearing before the arbitrators and in its papers in opposition to the motion, sufficiently developed the relevancy of the class of documents sought and the near impossibility of obtaining the information by other means. . . . Their relevancy to both the alleged breach and any damages is therefore clear" (452, 453). Plainly petitioner's contention that Philipp has failed to "demonstrate relevance" is specious and, accordingly, a substantial Federal question has not been raised under the Fourth Amendment.

B. World Commerce Has Not Been Denied Due Process

World Commerce attempts to raise a substantial Federal question under the due process clause of the Fourteenth Amendment by asserting: (1) that compliance with the subpoena will deprive it of "valuable property", and (2) that the taking of such property will be effected without judicial hearing. This argument fails in the first instance since World Commerce has not established that its docu-

ments are "valuable property" requiring the protection sought.

World Commerce asserts, and respondent concedes, that no judicial determination has been made as to the confidential nature of the documents. Indeed, none could be made since World Commerce has elected not to submit the disputed documents to the courts. The Appellate Division has ruled, however, that World Commerce is entitled to a determination as to the confidential nature of the documents and has afforded World Commerce the right to have a referee appointed for that purpose. Such a right cannot be said to be "illusory" since the courts of New York have discretionary authority over the conduct of a referee in the disposition of causes submitted to him. *Lecky* v. *Winston*, 186 App. Div. 642 (3rd Dept., 1919); *Matter of Ebbets*, 155 Misc, 860 (Surr. Ct., Kings Co. 1935).

Assuming for the purpose of argument that the documents subpoenaed contain confidential information, it is well established that the qualified privilege which attaches to such information must yield where the information is relevant and cannot otherwise be obtained. *Drake* v. *Herrman*, 261 N. Y. 414 (1933). Here, Philipp has amply demonstrated the relevancy of the documents and has further demonstrated the impossibility of obtaining the information sought through other means. Thus, it is clear that World Commerce has raised only a formal constitutional issue not rising to the dignity of a substantial Federal question.

The constitutional arguments raised by World Commerce in attacking the instant subpoena would apply equally to every corporate witness called upon to produce documents. Were it impossible for a party to compel one possessed of relevant information to produce such information, the effectuation of a litigants' rights would prove

impossible. Compulsory measures for the production of evidence are essential to the very existence of a court of justice in any civilized community." *Matter of Makames*, 238 App. Div. 534, 536 (4th Dept., 1933).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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